INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Barrow v. *Reab*, 9 How. 366	4
Boston Sand Co. v. *United States*, 278 U. S. 41	4
Cherokee Nation v. *United States*, 270 U. S. 476	4
District of Columbia v. *Johnson*, 165 U. S. 330	5
Ford Motor Co. v. *United States*, 9 F. Supp. 590, certiorari denied, 296 U. S. 636	6
Funkhouser v. *J. B. Preston Co.*, 290 U. S. 163	4
Standard Oil Co. v. *United States*, 10 F. Supp. 550, certiorari denied, 296 U. S. 597	6
Tillson v. *United States*, 100 U. S. 43	4
United States v. *Commonwealth Line*, 278 U. S. 427	4
United States v. *North American Co.*, 253 U. S. 330	5
United States v. *Verdier*, 164 U. S. 213	5
Statutes:	
Judicial Code, Section 177, U. S. C. Title 28, Sec. 284	4
Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083: Sec. 250 (b) (e)	7
Revenue Act of 1926, c. 27, 44 Stat. 9, 64: Sec. 283 (d)	8
Miscellaneous:	
Williston on Contracts, Vol. 3, Sec. 1413 (1st Ed.)	4
Sedgwick on Damages, Vol. 1, Sec. 312 (9th Ed.)	4

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 605

AMERICAN PROPELLER AND MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 46–83) is reported in 14 F. Supp. 168, and is supplemented by a memorandum filed October 5, 1936 (R. 45).

JURISDICTION

The original judgment of the court below in favor of petitioner was entered April 6, 1936. Both petitioner and respondent moved for a new trial (R. 43). Memorandum and order overruling petitioner's motion for a new trial and allowing in part respondent's motion for a new trial was en-

tered on October 5, 1936 (R. 44-46). The petition for a writ of certiorari was filed December 29, 1936 (R. 84). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner filed suit on a contract breached in 1918 and the United States counterclaimed for delinquent income and excess profits taxes for 1918; the Court of Claims decided favorably on the claims of each party. The question is whether, since the petitioner is not entitled to interest on its claim, the claims should be merged as of 1918, so as to prevent recovery of interest by the United States.

STATUTES INVOLVED

The pertinent portions of the applicable statutes are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

The special findings of fact of the Court of Claims are found at pages 46–70 of the Record, and are supplemented by the memorandum filed and the order entered October 5, 1936 (R. 44–46).

The suit in the Court of Claims was based solely on a breach by the United States of certain contracts. Counterclaim for delinquent income and excess-profits taxes for the year 1918 was duly filed by the United States. This counterclaim is based on a deficiency assessment made on June 14, 1924 (R. 66). The findings of fact and the conclusions

of law as to the amounts due the petitioner and the respondent are not disputed. The petition for a writ of certiorari asserts error only in respect of the refusal of the Court of Claims to merge the claims as of 1918, with the result that the United States recovered interest on the delinquent taxes.

The Court of Claims found that petitioner is entitled to recover $119,413.04 on the various claims set out in its petition. It refused to allow interest thereon (R. 77). The court also found that respondent is entitled to recover as an underpayment of taxes for 1918 the amount of $82,701.29 (R. 45). It allowed interest thereon at 6% from June 14, 1924, the date of the additional assessment (R. 66), to April 6, 1936, the date of the establishment of petitioner's claim and entry of judgment under the original opinion, in the amount of $58,607.64 (R. 45, 82). Thus the total allowance upon the counterclaim was $141,308.93 (R. 45). The Court of Claims therefore entered judgment in favor of the respondent in the amount of $21,895.89, with interest from April 6, 1936, the date of entry of the original judgment (R. 84).

ARGUMENT

Petitioner does not challenge the decision below insofar as it determined respondent's liability for breach of contract, petitioner's liability for unpaid taxes, or petitioner's inability to recover interest on its claim for breach of contract. It does not dispute the Government's right to recover interest

on the unpaid taxes apart from the effect of petitioner's claim for breach of contract. It seeks review of the decision below only insofar as it refuses to merge the tax claim into the contract claim as of the end of 1918 (Pet. 9–10).

Petitioner's argument that the claim for delinquent taxes should be merged into its claim for breach of contract would have the effect of allowing interest against the United States on the claim for breach of contract. It is settled that no such allowance can be made. Judicial Code, Section 177, U. S. C., Title 28, Sec. 284; *Tillson* v. *United States,* 100 U. S 43, 46; *Cherokee Nation* v. *United States,* 270 U. S. 476, 487. The rule is so well established that even in cross-libels arising out of a mutually negligent collision, where interest is ordinarily awarded, the United States can recover interest but the private owner cannot. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 49; *United States* v. *Commonwealth Line,* 278 U. S. 427.

Even apart from the inability to award interest against the United States on such a claim, the damages for the breach of contract were unliquidated. The general rule is that no interest can be awarded on such claims prior to judgment. *Williston* on Contracts, Vol. 3, Sec. 1413 (1st Ed.); *Sedgwick* on Damages, Vol. 1, Sec. 312 (9th Ed.); see *Barrow* v. *Reab,* 9 How. 366, 370–371; *Funkhouser* v. *J. B. Preston Co.,* 290 U. S. 163, 168. It seems to follow that there can be no merger of such a claim with a claim which is entitled to bear interest.

The petitioner urges only that the Court of Claims misconstrued *United States* v. *Verdier*, 164 U. S. 213, and entered a decision which conflicts in principle with *District of Columbia* v. *Johnson*, 165 U. S. 330. In the *Verdier* case the United States was held entitled to recover interest on the shortage of a postmaster's accounts even though the postmaster's claim for an increased salary was not allowed to bear interest. The Court based its decision in part on the statutory requirement that interest be paid on delinquent accounts of public officers and in part on the consideration that (pp. 218–219):

> An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position.

See *United States* v. *North American Co.*, 253 U. S. 330, 336, explaining the *Verdier* case as resting upon this latter ground. We see nothing in the decision below which misconstrues the *Verdier* case. *District of Columbia* v. *Johnson, supra,* has no application to this case. There an Act of 1895 allowed suit on claims against the District which had been illegal when they arose 20 years before. The court denied interest on these claims and also denied the District's counterclaim for interest on a related obligation which was extinguished by the

Act of 1895, as a result of which "the interest becomes thereby extinguished" (p. 339).

It was assumed by the court and the parties below that interest could be awarded on deficiencies arising under the 1918 Act. Petitioner did not object to this assumption in the court below and makes no objection here. *Ford Motor Co.* v. *United States,* 9 F. Supp. 590, 602 (C. Cls.), certiorari denied, 296 U. S. 636, and *Standard Oil Co.* v. *United States,* 10 F. Supp. 550, 562 (C. Cls.), certiorari on other grounds denied, 296 U. S. 597, which held that no interest could be collected on deficiencies under the 1917 and 1918 Acts assessed before February 26, 1926, are thus inapplicable.

CONCLUSION

It is settled that the plaintiff's inability to recover interest does not prevent the award of interest on the Government's counterclaim or permit merger of the claims. Wherefore, it is respectfully submitted that the petition, presenting this question alone, should be denied.

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FEBRUARY 1937.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

SEC. 250. * * *

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

* * * * *

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

* * * * *

Revenue Act of 1926, c. 27, 44 Stat. 9, 64:

SEC. 283. * * *

(d) In the case of any assessment made after the enactment of this Act in respect of a tax imposed by any Act of Congress prior to November 23, 1921, interest upon the tax proposed to be assessed shall be assessed at the same time as such tax, shall be paid upon notice and demand from the collector, and shall be collected as part of such tax, at the rate of 6 per centum per annum, from the date of the enactment of this Act to the date such tax is assessed, or, in the case of a waiver under subdivision (d) of section 274, to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is the earlier.

U. S. GOVERNMENT PRINTING OFFICE: 1937

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument	5
Conclusion	12
Appendix A	13
Appendix B	16

CITATIONS

Cases:	
Billings v. *United States*, 232 U. S. 261	6
Boston Sand Co. v. *United States*, 278 U. S. 41	6
Botany Mills v. *United States*, 278 U. S. 282	11
Brothers v. *United States*, 250 U. S. 88	11
Crocker v. *United States*, 240 U. S. 74	11
Ford Motor Co. v. *United States*, 9 F. Supp. 590, certiorari denied, 296 U. S. 636	6
Luckenbach S. S. Co. v. *United States*, 272 U. S. 533	12
Pacific States Co. v. *White*, 296 U. S. 176	10
Standard Oil Co. v. *United States*, 10 F. Supp. 550, certiorari denied, 296 U. S. 597	6
Stone v. *United States*, 164 U. S. 380	11
Thompson v. *Consolidated Gas Utilities Corp.*, No. 89, October Term, 1936	10
United States v. *Commonwealth Line*, 278 U. S. 427	6
United States v. *Esnault-Pelterie*, 299 U. S. 201	5, 10
United States v. *Jefferson Electric Co.*, 291 U. S. 386	12
United States v. *North American Co.*, 253 U. S. 330	6
United States v. *Pugh*, 99 U. S. 265	11
United States v. *Verdier*, 164 U. S. 213	6
United States v. *Wells*, 283 U. S. 102	11
Statutes:	
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 250	13
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 283	14
Revenue Act of 1935, c. 829, 49 Stat. 1014, Sec. 404 (U. S. C., Sup. II, Title 26, Sec. 1693 (a))	7
Revised Statutes, Sec. 3184 (U. S. C., Title 26, Sec. 1545)	9, 15
Miscellaneous:	
S. O. C. Mim. 2550 (Appendix B)	9, 16

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JURISDICTION

The original judgment of the Court of Claims in favor of petitioner was entered April 6, 1936. Both parties moved for a new trial. (R. 43.) Memorandum and order overruling petitioner's motion and allowing respondent's motion in part was entered on October 5, 1936 (R. 44–46).

The petition for a writ of certiorari was filed December 29, 1936, and was granted, limited to the question of the allowance of interest to the Government upon its claim, on February 15, 1936 (R. 84). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner brought suit on a contract breached in 1918, and the United States counterclaimed for delinquent income and excess profits taxes for 1918 which were assessed in 1924. The Court of Claims decided favorably on the claims of both parties. The sole question, under the order granting the petition for a writ of certiorari, is whether the Government is entitled to interest.

STATUTES INVOLVED

The pertinent portions of the applicable statutes are set forth in Appendix A (*infra*, pp. 13–15).

STATEMENT

The special findings of fact of the Court of Claims are found at pages 46–70 of the record, and are supplemented by the memorandum filed and the order entered October 5, 1936 (R. 44–46). Those which are relevant to the question under consideration may be summarized as follows:

The suit in the Court of Claims was based solely on a breach by the United States of certain con-

tracts in 1918. Counterclaim for delinquent income and excess profits taxes for the year 1918 was duly filed by the United States. The counterclaim, as amended, set forth that the petitioner was indebted to the respondent by reason of income taxes duly assessed and unpaid. These unpaid taxes included, among those for other years, the amount of $191,403.77 for the year 1918, representing an additional assessment made against petitioner in 1924. The counterclaim further alleged that petitioner was duly notified of the assessment and that it had not been paid (R. 42).

The additional assessment of $191,403.77 for 1918 was the only additional assessment considered by the court below. The Court of Claims found that this amount was assessed by the Commissioner of Internal Revenue against petitioner on June 14, 1924, and that petitioner was duly notified, and that no part of it has been paid by the petitioner (R. 66).

The Court of Claims found that petitioner was entitled to recover $119,413.04 on the various claims set out in its petition but refused to allow interest (R. 77). The court also found that respondent was entitled to recover for an underpayment of taxes for 1918; its memorandum on rehearing fixed the amount at $82,701.29 (R. 45). It allowed interest thereon at 6% from June 14, 1924, the date of the additional assessment (R. 66), to April 6, 1936, the date of the establishment of petitioner's claim